UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

JAY M. SAVOY, SR.,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 01-73-B***
	)	
LARRY G. MASSANARI,	***)***	
Acting Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

The plaintiff in this Social Security Disability ("SSD") appeal raises several issues, contending that the administrative law judge failed to comply with the directives of the Appeals Council on remand, that he improperly rejected psychological evidence, that he failed to develop the record properly, that he failed to obtain a consultative examination or consult a medical advisor at the hearing, that his conclusion that the plaintiff could return to his past relevant work was unsupported by substantial evidence, that he failed to comply with Social Security Ruling 83-20 concerning the onset of the plaintiff's mental impairment and that his finding that the plaintiff's testimony concerning the relevant time period was not entirely credible is not supported by substantial evidence. I recommend that the decision of the commissioner be vacated and the case remanded for further proceedings.

[1] This action is properly brought under 42 U.S.C. § 405(g). The commissioner has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on November 20, 2001, pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

In accordance with the commissioner's sequential evaluation process, 20 C.F.R. § 404.1520; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the administrative law judge found, in relevant part, that the plaintiff met the disability insured status requirements of the Social Security Act on January 1, 1993, the date he stated he became unable to work and had sufficient quarters of coverage to remain insured only through June 30, 1995 ("date last insured"), Finding 1, Record at 20; that the plaintiff had not engaged in substantial gainful activity since January 1, 1993, Finding 2, *id*.; that the medical evidence established that on the date last insured the plaintiff had mild degenerative joint disease, an impairment that was severe but did not meet or equal the criteria of any of the impairments listed in Appendix 1 to Subpart P, 20 C.F.R. Part 404 (the "Listings"), Finding 3, *id*.; that the plaintiff's statements concerning his impairment and its impact on his ability to work were not entirely credible, Finding 4, *id*.; that the plaintiff lacked the residual functional capacity to lift and carry more than 20 pounds, Finding 5, *id*.; that the plaintiff's impairment did not prevent him from performing his past relevant work as a housekeeper and security guard, Findings 6-7, *id*.; and that the plaintiff was not under a disability as defined in the Social Security Act at any time through the date last insured, Finding 8, *id*.[2] The Appeals Council declined to review the decision, *id*. at 5-6, making it the final decision of the commissioner, 20 C.F.R. § 404.981; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. § 405(g); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusions

[2] The administrative law judge found the plaintiff to be disabled as of May 6, 1996, the date of application, for purposes of Social Security Income benefits. Record at 21-22. That decision is not at issue in this proceeding.

drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The administrative law judge's decision was made at Step 4 of the sequential evaluation process, where the plaintiff bears the burden of proof of demonstrating inability to return to past relevant work. 20 C.F.R. § 404.1520(e); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987). At this step the commissioner must make findings concerning the plaintiff's residual functional capacity and the physical and mental demands of past work and determine whether the plaintiff's residual functional capacity would permit performance of that work. 20 C.F.R. § 404.1520(e); Social Security Ruling 82-62, reprinted in *West's Social Security Reporting Service* Rulings 1975-82, at 813. Analysis in this case is complicated by the fact that the determination must be made as of June 30, 1995, the date the plaintiff was last insured under the disability provisions of the Social Security Act, some three and one-half years before the hearing was held before the administrative law judge.

Discussion

A. The Remand Order

The plaintiff argues at length that he is entitled to remand because the administrative law judge failed to comply with the order of remand issued by the Appeals Council after review of the first decision of an administrative law judge on this issue, as requested by the plaintiff. Plaintiff's Itemized Statement of Specific Errors ("Statement of Errors") (Docket No. 5) at 6-11. The first decision, issued on August 19, 1997, awarded SSI benefits beginning on the date of application and denied SSD benefits. Record at 96-104. The plaintiff appealed from this decision to the Appeals Council, which remanded the case to an administrative law judge by order dated May 22, 1998. *Id*. at 138-40. The order of remand directed the administrative law judge, *inter alia*, to obtain additional evidence concerning the plaintiff's mental impairment before the date last insured, to give further consideration

to the plaintiff's residual functional capacity "during the entire period at issue" and to provide a rationale with specific references to the record evidence in support of assessed limitations and, "[i]f warranted by the expanded record," to obtain evidence form a vocational expert. *Id*. at 139. A second hearing was held, at which the plaintiff and a vocational expert testified. *Id*. at 51-89.

Specifically, the plaintiff contends that the administrative law judge failed to comply with the order of remand by failing to obtain a consultative examination or to use a medical advisor. Statement of Errors at 7. However, the order simply states that the additional evidence to be obtained "may include, if warranted and available, a consultative mental status examination." Record at 139. There is no mention of a medical advisor in the remand order, and the use of a consultative examination is clearly a matter left to the discretion of the administrative law judge. The plaintiff next argues that the administrative law judge "failed to specifically discuss RFC during the entire period at issue." Statement of Errors at 7. The remand order directed the administrative law judge to "[g]ive further consideration to the claimant's maximum residual functional capacity during the entire period at issue." Record at 139. Since the plaintiff had already been awarded SSI benefits, the "entire period at issue" can only be the period before the date last insured and after the alleged date of onset. The administrative law judge's opinion includes a discussion of residual functional capacity during this period. *Id*. at 16-17.

The plaintiff next asserts that the administrative law judge failed to "provide a rationale with specific references to the evidence." Statement of Errors at 7. I assume that this is a reference to the directive in the remand order that the administrative law judge "provide rationale [sic] with specific references to evidence of record in support of the assessed limitations." Record at 139. The administrative law judge's opinion does this. *Id*. at 16-17. The plaintiff next turns to the remand order's directive that hypothetical questions addressed to a vocational expert "should reflect the

specific capacity/limitations established by the record as a whole," *id*. at 139, and contends that the administrative law judge did not do so, Statement of Errors at 7, 8. However, the transcript of the hearing establishes that such questions were asked. Record at 81-89.

Even if the administrative law judge had failed to comply with a mandatory directive of the Appeals Council as set forth in the order of remand in a manner that affected his conclusions concerning the plaintiff's claim, I would decline to accept the invitation of the plaintiff's attorney to apply *Stegall v. West*, 11 Vet.App. 268, 271 (1998) ("The protracted circumstances of this case and others which have come all too frequently before this Court [of Veterans Appeals] demonstrate the compelling need to hold, as we do, that a remand by this Court or the Board [of Veterans' Appeals] confers on the veteran or other claimant, as a matter of law, the right to compliance with the remand orders.") to Social Security appeals. Counsel for the plaintiff could cite no authority in support of his position in the context of Social Security, nor did my research unearth any. In the absence of such authority and any clear statutory directive, *see* 42 U.S.C. § 405(g), the better approach for a reviewing court is to examine the substance of the commissioner's decision for compliance with the Social Security Act and the implementing regulations, rather than to focus on the administrative law judge's compliance with all of the terms of an order of remand from the Appeals Council.[3]

[3] The plaintiff also contends in this section of his statement of errors that the administrative law judge wrongly determined that his past work as a hotel or motel cleaner fell within the light exertional classification rather than the heavy classification established by the Dictionary of Occupational Titles. Statement of Errors at 10-11. However, at Step 4 of the sequential evaluation process, which is the stage involved here, the administrative law judge is in fact "entitled to rely upon claimant's own description of the duties involved in [his] former job;" he must "ascertain the demands of the usual former work and *then* compare those demands with present mental and physical abilities." *Santiago v. Secretary of Health & Human Servs.*, 944 F.2d 1, 5 (1st Cir. 1991) (emphasis in original). *See also* 20 C.F.R. § 404.1520(e): "If we cannot make a decision based on your current work activity or on medical facts alone, and you have a severe impairment(s), we then review your residual functional capacity and the physical and mental demands of the work you have done in the past. If you can still do this kind of work, we will find that you are not disabled." Both the plaintiff's description of his past relevant work and the type of work as it is generally performed in the national economy is relevant at Step 4. *Andrade v. Secretary of Health & Human Servs.*, 985 F.2d 1045, 1051 (10th Cir. 1993). In any event, counsel for the commissioner argued persuasively that the plaintiff's description of his past cleaning work fell within section 321.173-010 of the Dictionary of Occupational Titles, which is classified as light work, rather than section 381.687-014, the heavy work classification identified by the plaintiff. Statement of Errors Exh. 1. *See* Record at 40, 163, 170-71.

B. Dr. DiTullio's Opinion

The plaintiff offered the one-paragraph "addendum" dated September 23, 1998 from William DiTullio, Ed.D., a clinical psychologist, Record at 240, as evidence to support his claim that he was disabled before the date last insured by a mental impairment. He contends that the administrative law judge wrongly refused to accept Dr. DiTullio's conclusion that "his anxiety and depression became disabling by early 1995, and prior to 6/30/95," *id*., and that this error entitles him to a remand. Statement of Errors at 4-6. Dr. DiTullio saw the plaintiff on April 8, 1997 and apparently again on September 10, 1998. Record at 220, 240.[4] His one-page report from the April 8 examination does not mention any testing or review of medical records. His addendum refers to review of medical records from 1994 and 1995. *Id*. at 240. The only other evidence in the record concerning a possible mental impairment before the date last insured is the plaintiff's own testimony that since February 1995 his "sleep hasn't been really that good, the depression factor is really bad," *id*. at 64-65; that around June 30th of 1995 he "lost interest in a lot of activities," *id*. at 65; that since June 30, 1995 his energy and ability to concentrate and think have been decreasing and he has very low self esteem, *id*. at 66-67; that he had been having trouble for a significant period of time before Bucksport Regional Health Center sent him to Mr. Good, a counselor, due to his depression in 1996, *id*. at 68; and that in his opinion, due to his depression and back and leg problems, he has been unable to find any work that he could do since June 30, 1995 or earlier, *id*. at 73. He also testified that, while his symptoms of depression started in 1994 or 1995, "they weren't so severe then as they are now." *Id*. at 77.

The administrative law judge stated that he disagreed with Dr. DiTullio's conclusion that the plaintiff's anxiety and depression "date back to early 1995," *id*. at 15, because

[4] The addendum refers to an examination on September 10, 1998 and a report dated September 14, 1998. Record at 240. No such report appears in the record.

> [t]here is no mention of any depression or anxiety throughout the claimant's application documents. The issue of anxiety and depression is not noted in the file until April 9, 1997. The claimant's pain questionnaire as well as his disability report make no mention of any other impairment besides a back and hand impairment. Likewise, although the undersigned finds some agreement with Dr. DiTullio that the claimant physical condition [sic] increased his anxiety and depression, the objective medical record does support [sic] a worsening condition until 1996 (Exhibit 5F). Therefore, at the time the claimant was last insured, there is no evidence, either through allegation or medical records, that the claimant experienced depression and anxiety.

Id. Exhibit 5F includes Dr. DiTullio's first report, *id*. at 220-21, which provides no support for the assertion that either the plaintiff's mental condition or his physical impairments did not grow worse until 1996. The plaintiff contends that Dr. DiTullio's opinion concerning his mental impairment before June 30, 1995 cannot be rejected because there is no contradictory evidence in the record and, in the alternative, that the administrative law judge was required to develop the record further by contacting Dr. DiTullio for clarification of the significance of his findings or ordering a consultative mental examination. Statement of Errors at 4-6.

Dr. DiTullio's opinion that the plaintiff's anxiety and depression "became disabling" before the date last insured is an opinion on an issue reserved to the commissioner and accordingly "does not mean that [the commissioner] will determine that [the claimant is] disabled." 20 C.F.R. § 404.1527(e)(1). To be sure, the administrative law judge was required to consider DiTullio's opinion, 20 C.F.R. § 404.1527(b), and to give it more weight "[t]he more [he] present[ed] relevant evidence to support [his] opinion, particularly medical signs and laboratory findings," 20 C.F.R. § 404.1527(d)(3). "The better an explanation a source provides for an opinion, the more weight [the commissioner] will give that opinion." *Id*. Dr. DiTullio presents very little in the way of medical signs and results of testing to support his opinion concerning the onset of the plaintiff's alleged mental

impairment.[5] Indeed, he fails to mention at all any effects that the impairment would have on the plaintiff's ability to perform work activities beyond the conclusory statement that the impairment was "disabling."

The plaintiff offers no authority to support his contention that Dr. DiTullio's conclusion that his mental impairments were "disabling" before the date last insured must be adopted by the commissioner, and the fact that this opinion addresses a question reserved to the commissioner makes that contention unsupportable. The plaintiff's alternative argument is more appealing. The administrative law judge's duty to develop the administrative record exists even when the plaintiff is represented by an attorney, *Perez v. Chater*, 77 F.3d 41, 47 (1st Cir. 1996), as was the case here. The Appeals Council in its order of remand found that Dr. DiTullio's initial report was "limited to a narrative of the claimant's complains on the date of the examination . . . [w]ithout any mental status findings," so that "there is no evidence [in the record] to support severity of a mental condition." Record at 139. Dr. DiTullio's addendum (without the referenced report) provides no further mental status findings and does not supplement the first report in any meaningful way with respect to the additional evidence sought by the Appeals Council. The remand order specifically refers the administrative law judge to 20 C.F.R. §§ 404.1512 & 404.1513. *Id*. Dr. DiTullio's addendum does not begin to meet the requirements of 20 C.F.R. § 404.1513(b). In addition, no medical evidence in the record controverts Dr. DiTullio's opinion concerning disability. *See Nguyen v. Chater*, 172 F.3d 31, 35 (1st Cir. 1999). The plaintiff's own testimony on the point is minimal, much of it being directed to the progression of his symptoms after June 30, 1995 and, even when clearly directed to the period before that date, being so general or conclusory as to be of little assistance in making the

[5] The plaintiff cites *Schaal v. Apfel*, 134 F.3d 496 (2d Cir. 1998), in support of his arguments on this point. Statement of Errors at 5. That opinion deals with a version of the "treating physician rule" predating the current version of 20 C.F.R. § 404.1527(d)(2). 134 F.3d at 503-05. Dr. DiTullio, who saw the plaintiff once, was not a treating physician and *Schaal* is therefore distinguishable.

necessary determination.[6] In addition, the regulatory requirement that the administrative law judge ensure the development of an adequate record is admittedly somewhat in conflict with the assignment of the burden of proof to the plaintiff at Step 4 of the sequential review process. Nonetheless, in this case, particularly given the clear directive of the Appeals Council, the duty to develop the record weighs more heavily. Accordingly, remand for further development of the record with respect to the plaintiff's alleged mental impairment as it existed before the date last insured is indicated.

C. Social Security Ruling 83-20

While I have already recommended that this case be remanded for further proceedings on the basis of the administrative law judge's responsibility to develop the record, I will briefly address the remaining issues raised by the plaintiff to provide additional guidance to the parties during the remand. The plaintiff contends that the administrative law judge failed to comply with Social Security Ruling 83-20 in determining the date of onset of his alleged mental disability. Statement of Errors at 14-20. He suggests that the administrative law judge wrongly insisted on contemporary medical evidence in order to find that a severe mental impairment existed before June 30, 1995. *Id*. at 14. I do not so read the opinion. *See* Record at 15.

Social Security Ruling 83-20 deals with the date of onset of disability. That is a slightly different question from the question before the commissioner in this case: whether the plaintiff was disabled for purposes of the Social Security Act before the date last insured. However, the Ruling

[6] The administrative law judge's reliance on the absence of any mention of anxiety and depression in the plaintiff's pain questionnaire and disability report as evidence contradicting Dr. DiTullio's conclusion is inappropriate given the Appeals Council's recognition of the possibility of a mental impairment and the language of 20 C.F.R. § 404.1512(a): "We will consider only impairment(s) you say you have or about which we receive evidence." I note in addition that both documents were filed before the first hearing and before the plaintiff was represented by counsel. Record at 124, 128, 159-64, 196-98. At oral argument, counsel for the commissioner agreed that it is the evidence submitted, not the application documents, that should be considered by the administrative law judge with respect to the existence of impairments.

provides valuable guidance on the latter question as well. The policy statement of the Ruling provides, in relevant part:

> The onset date of disability is the first day an individual is disabled as defined in the Act and the regulations. Factors relevant to the determination of disability onset include the individual's allegation, the work history, and the medical evidence. These factors are often evaluated together to arrive at the onset date. However, the individual's allegation or the date of work stoppage is significant in determining onset only if it is consistent with the severity of the condition(s) shown by the medical evidence.

Social Security Ruling 83-20 ("SSR 83-20"), reprinted in *West's Social Security Reporting Service* Rulings 1983-92 at 49. Here, the plaintiff alleged an onset date and a date last worked of January 1, 1993. Record at 20, 30, 102. The only medical evidence he provided concerning onset of the alleged mental impairment is to the effect that he was disabled by anxiety and depression before June 30, 1995. The alleged onset date and date last worked are thus of little assistance in the current inquiry. The Ruling also provides:

> Determining the onset date is particularly difficult, when, for example, the alleged onset and the date last worked are far in the past and adequate medical records are not available. In such cases, it will be necessary to infer the onset date from the medical and other evidence that describe the history and symptomatology of the disease process.

SSR 83-20 at 51. "How long the disease may be determined to have existed at a disabling level of severity depends on an informed judgment of the facts in the particular case." *Id*. In this case, there would be no medical records because the plaintiff did not seek treatment for anxiety or depression until 1996. It is not clear from Dr. DiTullio's addendum which medical records he reviewed contained descriptions of the history and symptomatology of either condition, if indeed any of those records did contain such information. The administrative law judge concluded that they did not. It would have been better if he had called upon a medical advisor to determine whether a reasonable inference could have been made concerning this question based on the existing medical records and

SSR 83-20 appears to require an administrative law judge to do so. ("At the hearing, the administrative law judge (ALJ) should call on the services of a medical advisor when onset must be inferred." *Id*.) Because there is no evidence in the record to support a conclusion as to "what medical presumptions can reasonably be made about the course of the condition," *id*. at 52, a medical advisor should be consulted on remand. *See Bailey v. Chater*, 68 F.3d 75, 79 (4th Cir. 1995). This is not because the administrative law judge wrongly insisted on contemporaneous medical evidence, as the plaintiff contends, but rather because the basis for a medical judgment on the issue cannot be identified through resort to the existing record. *Cf. Jones v. Chater*, 65 F.3d 102, 104 (8th Cir. 1995) ("Where the impairment onset date is critical, however, retrospective medical opinions alone will usually not suffice unless the claimed disability date is corroborated, as by subjective evidence from lay observers like family members.").

D. Credibility

The plaintiff also assails the administrative law judge's finding that his limited testimony concerning his mental impairment and its impact on his ability to work before the date last insured was not entirely credible. Statement of Errors at 11-14. He bases this challenge on the assertions that his unspecified testimony is "undisputed" and "uncontradicted," *id*. at 12, and that the administrative law judge provided no explanation as to the way in which discrepancies between his "assertions and information contained in the documentary reports," Record at 17, undermined his credibility, Statement of Errors at 13. This assertion of error relates only to the plaintiff's claim of physical impairments. Contrary to the plaintiff's claim, the administrative law judge explained the discrepancy as a lack of evidence of any treatment for back pain during the relevant period. Record at 16. Also, contrary to the plaintiff's assertions, the commissioner is free to reject a claimant's "undisputed" testimony concerning symptoms when there is no objective medical evidence to support them. 20

C.F.R. § 404.1529(a). That is what the administrative law judge correctly did in this case. *See generally* Social Security Ruling 96-7p, reprinted in *West's Social Security Reporting Service* Rulings 1983-92 (Supp. 2001).

The plaintiff relies on a perceived inconsistency between the administrative law judge's discounting of his credibility with respect to his testimony concerning the time before June 30, 1995, Finding 4, Record at 20, and his statement that "the claimant has an underlying medically determinable impairment that could reasonably cause the pain and other symptoms alleged," *id.* at 15-16, to support his credibility argument. Statement of Errors at 13. The latter statement, a necessary finding in the sequential evaluation process, 20 C.F.R. § 404.1529(a), is not necessarily "in direct conflict" with the conclusion that the asserted degree of impairment and its impact on his ability to work were not credible, as the plaintiff contends, Statement of Errors at 13. The quoted finding must be made before the commissioner can proceed to determine whether a claimant's symptoms may be found to affect his ability to do basic work activities. 20 C.F.R. § 404.1520(c). It is only at that point that the alleged degree of severity of those symptoms becomes relevant and the plaintiff's credibility an issue for the administrative law judge. That evaluation takes place at Step 4 of the sequential evaluation process. 20 C.F.R. § 404.1520(e).

Conclusion

For the foregoing reasons, I recommend that the commissioner's decision as to SSD be **VACATED** and the case **REMANDED** for further proceedings consistent herewith.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum,

within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 26th day of November, 2001.

_____

David M. Cohen
United States Magistrate Judge

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